Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	WT Docket No. 97-81
Regarding Multiple Address Systems	)	

PETITION FOR CLARIFICATION AND RECONSIDERATION

Radscan, Inc. ("Radscan"), by its attorneys, and pursuant to Section 1.429 of the Commission's Rules, hereby submits this Petition for Clarification and Reconsideration of the Commission's Report and Order in the above-captioned proceeding.[1] Specifically, Radscan seeks clarification that it may continue to apply for licenses in the 928/952/956 MHz Multiple Address Systems ("MAS") bands since it provides a "private internal service" as that term is defined in Section 101.1305 of the Commission's Rules. In the unlikely event that the Commission determines that Radscan does not provide a private internal service, Radscan seeks reconsideration of new Section 101.1331 of the Commission's Rules which could be interpreted as eliminating a MAS licensee's grandfathered status if a MAS station is transferred or assigned after January 19, 2000.

1. Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, FCC 99-415 (rel. Jan. 19, 2000) ("*Report and Order*"), *corrected*, *Erratum*, DA 00-307 (rel. Mar. 3, 2000) ("*Erratum*"). The *Report and Order* was published in the Federal Register on April 3, 2000. 65 Fed. Reg. 17,445.

I. BACKGROUND

Radscan, a wholly-owned subsidiary of Pittway Corporation ("Pittway"), holds approximately 150 MAS licenses in over twenty major metropolitan areas in the 928/952/956 MHz bands. For over fifteen years, Radscan has used these licenses to transmit internal communications associated with the provision of sophisticated security alarm monitoring services for business and residential properties. Central station alarm companies such as ADT Security Systems and Security Link from Ameritech offer Radscan's alarm monitoring service to their customers in conjunction with, or as an alternative to, their traditional wireline service offerings.

In each area where Radscan operates, it constructs a network of master stations operating on one set of MAS frequencies with overlapping service contours. Remote units installed at end-user premises monitor a variety of alarm conditions. Remote units may be either two-way transceivers polled by master stations or one-way transmitters programmed to send messages to master stations at certain intervals. Each remote unit can communicate with multiple master stations. Radscan's master stations are free-standing, multi-microprocessor systems which poll and monitor the transmissions of remote units, decode messages, validate transmitted codes, buffer and screen classes of messages, communicate with other master stations, and communicate by back-up telephone modem with central stations.

On February 4, 2000, as part of a $2.2 billion tender offer which was initiated in December of 1999, Pittway merged with Honeywell International Inc. ("Honeywell"). As a result of that merger, control of Pittway, Radscan's parent, was transferred to Honeywell. However, Radscan remains a subsidiary of Pittway and Radscan's use of its MAS licenses remains unchanged.

II. ANALYSIS

A. Radscan provides a private internal service.

In the *Report and Order*, the Commission ruled that licenses in the 928/952/956 MHz MAS bands are reserved for private internal services.[2] A "private internal service" is defined as "a service where entities utilize frequencies purely [i] for internal business purposes or public safety communications and [ii] not on a for-hire or for-profit basis."[3] As discussed below, Radscan meets both of these requirements.

1. Radscan uses its frequencies purely for internal business purposes.

In analyzing whether MAS frequencies are used for private internal purposes, the Commission has considered whether a licensee's subscribers have the ability to receive or transmit directly communications signals.[4] Neither subscribers to Radscan's security service nor Radscan's central station customers have access to any transmission capacity on Radscan's MAS frequencies. Instead, all information transmitted on Radscan's frequencies is selected and formatted by Radscan.

A subscriber to Radscan's alarm monitoring system purchases a remote unit that generally is mounted in an out-of-the-way place such as an attic or a machine room. The remote unit is a

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2. *Report and Order* at ¶ 20.

3. 47 C.F.R. § 101.1305 (2000) (*Erratum* at ¶ 4(l). While Radscan believes its service qualifies as a "public safety communication," this issue is currently pending before the Commission in WT Docket No.99-87. *In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz*, WT Docket No. 99-87, *Notice of Proposed Rule Making*, 14 FCC Rcd 5206 (1999). *See* Comments of Radscan in WT Docket No. 99-87.

4. *See* GTECH Corp. et al., *Memorandum Opinion and Order*, 13 FCC Rcd 4290, 4297 (1998) (*"GTECH Order"*).

passive telemetry device, capable only of reporting the status of various sensors such as the door and window monitors or fire prevention systems to which they are connected.[5] A remote unit reports this information to master stations within whose service areas it resides, either when polled or at regular, predetermined intervals. End-users have no choice regarding the form or content of the messages transmitted by a remote unit.[6] Instead, the form and content of messages sent over Radscan's network are determined by the Radscan network itself.

The Commission has previously concluded, on the basis of these facts, that Radscan does not provide subscribers with the ability to receive or to transmit directly communications signals.[7] First, more than fifteen years ago, before Radscan filed its first MAS application, Radscan met with senior Commission staff to determine whether Radscan met the eligibility criteria for licensing under the Private Radio rules in effect at the time. That determination hinged upon whether Radscan proposed

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5. Radscan's use of MAS frequencies for monitoring and status reporting is, in many respects, comparable to the energy distribution automation systems that use remote units located at customer premises to enable utilities to control energy peak usage through load management techniques. In the *Further Notice of Proposed Rule Making and Order* in this proceeding, the Commission implies that such automation systems are used for private business purposes. *Amendment of the Commission's Rules Regarding Multiple Address Systems*, WT Docket No. 97-81, *Further Notice of Proposed Rule Making and Order*, 14 FCC Rcd 10744, 10746 (1999).

6. Even when an end-user (or an intruder) "initiates" the transmission of a signal that constitutes a message (*e.g.*, "there is an open window"), such a "message" undergoes specific processing and is not always passed through the network. Radscan's system is designed to reject false alarms by monitoring and tracking the status of each remote unit at the end-user site, and by comparing the signal received from a remote unit at one master station with that received at others. Any master station receiving the message independently makes a decision whether to alert the user's central station monitoring company of the alarm condition. For any number of reasons, a master station may choose to block the alarm message and not pass it on to the central station if it believes that the message represents a false alarm.

7. *GTECH Order* at 4297.

an "internal use" or a "common carrier communications service."[8] The former was permissible under the Rules, but the latter was not. The FCC staff concluded that Radscan's use of MAS was internal, and did not involve the transmission of end-user communications.

Second, in 1998, the Wireless Telecommunications Bureau determined that Radscan did not offer a "subscriber-based" service, and thus was not subject to the freeze on subscriber-based applications which was then in effect.[9] While the statute upon which the application freeze was based has since been repealed, the findings in that case remain valid and are directly relevant to the issue of whether Radscan provides a private internal service. The Bureau recognized that the freeze was applicable to applications proposing "in essence, [to] resell the spectrum to subscribers," (*i.e.*, subscriber-based uses), but not to applications proposing "private use."[10]

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8. *See* 47 C.F.R. § 94.9(a)(1) and (b)(1)(1983).

9. *GTECH Order* at 4297.

10. *Id.* at 4293-4, *citing* legislative history. Even in this proceeding, the Commission implies that the terms "subscriber-based" and "private internal" create two mutually exclusive categories of use into one or the other of which every potential use must fall. *See Amendment of the Commission's Rules Regarding Multiple Address Systems*, WT Docket No. 97-81, *Notice of Proposed Rulemaking*, 12 FCC Rcd 7973, 7980 ("Because currently the principal use of the band does not appear to involve subscriber-based services, we tentatively conclude that the 988/952/956 MHz bands should be designated exclusively for private, internal use"); *id.* at 7981 ("in the event that we find that the principal use [of the bands involves] subscriber-based service . . . . Alternatively, if we conclude that the principal use [of the bands] is likely to remain private . . . ."). The Commission's other decisions regarding "private internal" service reinforce this understanding. *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2352 (1994) ("the term 'private services' referred to services that did not involve the payment of compensation to the licensees by subscribers, *i.e.*, that were for internal use"); *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 1411, 1429 (1994) (distinguishing between "internal use" and "offer[ing] a for-profit service to the public") ("*Regulatory Treatment of Mobile Services Second R&O*"). The Commission expressly intends such "other rule making (continued...)

2. Radscan does not make its frequencies available on a for-hire or for-profit basis.

Under the Commission's new rules, a private internal service must be one in which the use of frequencies is not "on a for-hire or for-profit basis."[11] The Commission previously has held that an entity that operates a radio system exclusively for its own internal use is treated as operating on the system on a not-for-profit basis.[12] In doing so, the Commission drew a clear distinction between radio systems "offered with the intent of receiving compensation" and those "operated by licensees who require highly customized . . . radio facilities for their personnel to use in the conduct of the licensee's underlying business."[13] The former are treated as for-profit, while the latter are private internal systems operated on a not-for-profit basis.

Radscan is no different from other MAS licensees whose status as private internal users does not appear open to question. For example, electric power utilities make extensive use of MAS spectrum for remote telemetry, meter reading, and SCADA functions. Like an electric utility, Radscan provides a for-profit service to subscribers using MAS spectrum even though the communications service itself is not the end-product. An electric utility receives compensation from subscribers for the provision of electricity, not for the provision of a communications service. Similarly, Radscan receives compensation from subscribers for the provision of security services,

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10. (...continued)
proceedings" to confirm its definition of "private internal system." *Report and Order* at ¶ 20 n.38.

11. 47 C.F.R. § 101.1305 (2000) (*Erratum* at ¶ 4(l)).

12. *Regulatory Treatment of Mobile Services Second R&O* at 1428.

13. *Id.*

not for the provision of a communications service. In both cases, the frequencies are merely a tool which facilitates the provision of the end-product. Therefore, neither makes its frequencies available on a for-hire or for-profit basis.

B. If Radscan's use of MAS frequencies is not considered a "private internal service," then the Commission should clarify that the Honeywell/Pittway merger does not vitiate Radscan's grandfathered status.

If the Commission concludes that Radscan is not using MAS frequencies to provide a private internal service, then Radscan must rely on its status as a "grandfathered" MAS licensee in order to continue providing vital alarm monitoring services to its customers. In that event, Radscan seeks reconsideration of Section 101.1331 to the extent that the rule may be interpreted as stripping Radscan of its grandfathered status by virtue of the recently consummated Honeywell/Pittway merger. As discussed more fully below, there is no public policy rationale for the Commission to impose restrictions which effectively prohibit such transfers -- especially where there is no change in the underlying services provided by the MAS licensee.

In the *Report and Order*, the Commission recognized that changing the eligibility rules for licensing in the 928/952/956 MHz bands could pose a potential hardship to incumbent licensees that are ineligible under the new rules.[14] For example, many incumbent users in these bands may not have the resources to relocate their operations to other spectrum which could compromise the important functions that they provide.[15] In addition, significant investment in equipment would be lost because this equipment could no longer be used in these bands. In recognition of the validity of these concerns, the Commission concluded that the public interest would be best served to (1) preserve

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14. *Report and Order* at ¶ 21.

15. *Id.* at ¶ 56.

current operations in the 928/952/956 MHz bands (including system expansion) and (2) minimize the amount of disruption that existing operations would experience because of the rule change. To this end, the Commission held that incumbents in the 928/952/956 MHz bands and the services that they provide should be grandfathered indefinitely.[16]

However, new Section 101.1331 contains language that could be interpreted to limit the protections that the Commission intended to extend to incumbent operations in these bands where the underlying use of the MAS frequencies has not changed. Specifically, Section 101.1331(a) states that "Any station licensed by the Commission prior to July 1, 1999, *as well as any assignments or transfers of such stations as of January 19, 2000*"(emphasis added) shall be considered incumbent operations. This could be interpreted to mean that stations which are assigned or transferred *after* January 19, 2000 are *not* incumbent operations. In addition, Section 101.1331(b) states that "Incumbent operators in the [MAS bands] are grandfathered *as of January 19, 2000*, and may continue to operate and expand their systems... ." (Emphasis added.) This could be interpreted to mean that an operator *loses* its "incumbent" status if its MAS licenses are transferred or assigned *after* January 19, 2000.

The Commission should clarify that a transfer of control of the parent company of a MAS incumbent licensee -- whether or not that transfer occurs after January 19, 2000 – does *not* eliminate the licensee's grandfathered status under Section 101.1331(b) as long as the underlying use of the MAS licensee's frequencies remains the same. For example, notwithstanding the Pittway/Honeywell merger which occurred after January 19, 2000, Radscan continues to be the licensee of the MAS authorizations it held prior to the merger, and it continues to use these

16. *Id.* at ¶¶ 55-62.

authorizations to provide the same services as it did prior to the merger. Requiring Radscan to relocate its operations after fifteen years of operation would be inconsistent with the public interest considerations articulated by the Commission in the *Report and Order* (*i.e.*, to preserve current operations in the bands and to minimize any disruptions to current operations as a result of the Commission's new rules).[17]

Finally, the Commission's failure to articulate in the *Report and Order* any rationale whatsoever for restricting **all** assignments and transfers of incumbent stations is unlawful under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"). Under the procedures dictated therein, "an agency must have articulated a rational connection, *i.e.*, supporting reason, between its fact findings and its action."[18] The Commission's failure to articulate any justification for this restriction is particularly egregious in light of its rationale for *rejecting* a sunset provision of the grandfather provisions. In this regard, the Commission asserted that a sunset provision -- which would have required licensees to surrender their licenses even if the underlying use of the frequencies remained the same -- was contrary to its public policy objectives of preserving current

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17. *Id.* There are numerous other situations where a strict broad application of the January 19, 2000 cut-off on transfers and assignments of MAS licenses would serve no public policy interest. For example, an existing MAS licensee may need to assign its licenses to an affiliate through a pro forma assignment for purely business and administrative reasons. Again, as long as the underlying use of the licensee's frequencies remains the same, an assignment should not result in a loss of incumbency.

18. *CellNet Communications, Inc. v. FCC*, 149 F.3d 429, 438 (6th Cir. 1998) (citing *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 758 (6th Cir. 1995), *See also Alenco Communications Inc. v. FCC*, 201 F.3d 608, 620 (5th Cir. 2000) (stating that the agency must articulate a rational relationship between the facts found and the choice made). If despite the arguments set forth herein, the Commission decides to interpret Section 101.1331 as broadly restricting assignments and transfers of the licenses of incumbent stations, it should, at a minimum, modify its rules to grandfather those stations which were assigned or transferred prior to June 2, 2000 (the effective date of the Commission's new rules) or for which assignment or transfer of control applications were filed prior to June 2, 2000.

operations and minimizing the amount of disruption that existing operations would experience.[19] A broad application of the restriction on assignments and transfers amounts to a *de facto* sunset provision contrary to the Commission's goals.

III. CONCLUSION

Consistent with the foregoing, Radscan respectfully requests that the Commission (1) clarify that Radscan is eligible as a "private internal" user to apply for licenses in the 928/952/956 MHz bands, or (2) conclude that grandfathered MAS operations will remain grandfathered even if the operator of the grandfathered system transfers or assigns the underlying MAS licenses as long as the underlying use of the MAS licensee's frequencies remains the same.

Respectfully submitted,

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19. *Report and Order* at ¶ 56.